A

DEVAN & ASSOCIATES v. TSR BINA SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
ABANG ISKANDAR JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: W-02(NCVC)(W)-2000-09-2013]
11 NOVEMBER 2014

TORT: *Negligence – Professional negligence – Respondent alleged former solicitors negligent in handling case – Respondent aggrieved by Order of High Court – Former*
C *solicitors filed notice of appeal against Order – Respondent appointed new solicitors – New solicitors filed application to set aside Order and withdrew notice of appeal filed by former solicitors – Court dismissed application to set aside Order on basis of wrong mode used – Whether novus actus interveniens existed – Whether caused fatal break in chain of causation – Whether former solicitors negligent and liable*
D *for damages*

CIVIL PROCEDURE: *Appeal – Appeal to Court of Appeal – Respondent aggrieved by Order of High Court – Whether mode of appeal proper*

In 2004, the respondent ('TSR') engaged the appellant ('Devan &
E Associates') to represent it in defending a suit brought against it by Josu Engineering Construction Sdn Bhd at the Seremban High Court ('Josu's Suit'). At the same time, Devan & Associates was also instructed to prosecute a counterclaim against Josu in the same suit. Devan & Associates wrote to TSR to forward their documents to enable the filing of TSR's bundle of
F documents in Josu's Suit as soon as possible. However, TSR did not forward the required documents nor gave any instructions to Devan & Associates. At the case management of Josu's Suit, Devan & Associates could not attend court as it was engaged in other matters in the Kuala Lumpur High Court as well as in Shah Alam High Court. As such, one Mohammed Azmi, a counsel, was instructed to be present at the Seremban High Court and to mention on
G behalf of Devan & Associates. During the said case management, Josu submitted that TSR had not responded to Josu's bundle of documents. As such, Josu made an oral application that TSR's defence and counterclaim in Josu's Suit be struck out. The Seremban High Court Judge ('SHCJ') allowed Josu's oral application during the said case management and ordered,
H amongst others, that damages be assessed before the Registrar ('6 February 2007 Order'). Aggrieved, Devan & Associates filed a notice of appeal on behalf of TSR against the 6 February 2007 Order. Subsequently, TSR appointed its new solicitors, Messrs Jasbeer, Nur & Lee ('JNL') to take over the conduct of Josu's Suit from Devan & Associates. JNL then filed an
I application *vide* encl. 17 to set aside the 6 February 2007 Order and withdrew the appeal which was filed by Devan & Associates. On 3 February 2009, the

SHCJ dismissed encl. 17, reason being that TSR had employed the wrong mode in its attempt to overturn the 6 February 2007 Order. The SHCJ was of the view that the correct and proper mode ought to have been by way of filing a notice of appeal. TSR then appealed to the Court of Appeal ('COA') against the 3 February 2009 decision. The COA dismissed TSR's appeal and TSR's application for leave to appeal to the Federal Court was also dismissed. Consequently, TSR filed an action against Devan & Associates in the Kuala Lumpur High Court ('KLHC') alleging among others, that Devan & Associates had been negligent in handling Josu's Suit. TSR had also pleaded the amount claimed in Josu Suit as damages even though in Josu's Suit the damages that was to be assessed by the Registrar had not been quantified as yet. In response, Devan & Associates filed its defence as well as a counterclaim for unpaid legal bills which was due to Devan & Associates for services rendered to TSR. Apart from denying negligence, Devan & Associates raised, *inter alia*, the issue of *novus actus interveniens* as there was a fatal break in the chain of causation of damage due to JNL's conduct. At the conclusion of the trial, the trial judge entered judgment in favour of TSR and made a declaration that TSR was entitled to a full indemnity for all losses as a result of 6 February 2007 Order in Josu's Suit. As regards the counterclaim, the trial judge allowed the sum claimed by Devan & Associates. Dissatisfied, Devan & Associates appealed against the High Court's decision while TSR filed their cross-appeal against TSR's counterclaim.

Held (allowing appellant's appeal with costs; dismissing respondent's cross-appeal with costs)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) Had TSR continued with the correct mode as filed by Devan & Associates, there was a likelihood that the 6 February 2007 Order might have been overturned on its merit which would then have the effect of returning the parties in Josu's Suit to *status quo*. The crucial point to consider was whether the last causative act constituted a wholly independent cause of damage that the original tortfeasor would escape liability for his initial wrong doing. Evidence had clearly showed that the subsequent act of JNL had effectively constituted a new intervening act which had the effect of completely exonerating Devan & Associates of any liability towards TSR. In law, *novus actus interveniens* brought about by JNL had accorded Devan & Associates a complete defence. (paras 26 & 28)

(2) There was merit in the complaint by Devan & Associates that the trial judge had failed to completely address her mind to this issue of *novus actus interveniens* although it was identified as an issue to be ventilated during the trial. The issue of *novus actus interveniens* was a relevant and

valid issue that had been ventilated and submitted before the trial judge and the trial judge in not addressing her mind to the same had denied Devan & Associates the opportunity of having a legal defence that was clearly open to it. That non-direction had amounted to a misdirection. (para 29)

(3) Devan & Associates owed a duty of care to TSR as solicitors and counsel acting for TSR in Josu's Suit. In such a relationship of solicitor and client, there was a need for both parties to be able to discharge their respective roles properly. It was clear that TSR had not been forthcoming with the supplying of documents to Devan & Associates for the purpose of preparing the statement of defence and the counterclaim in Josu's Suit. Thus, Devan & Associates had not breached its duty of care that was owed to TSR. The trial judge had erred in finding Devan & Associates to be negligent. There was also no incidence of contributory negligence occasioned by Devan & Associates. As such, Devan & Associates was not liable for any damages. (paras 32 & 37)

(4) With regards to the non-appearance of Devan & Associates personally before the Seremban High Court, Devan & Associates had arranged for another counsel to mention on its behalf. This would be sufficient justification and it could not be considered as an insult to the court. As there was no negligence established against Devan & Associates, the issue of damages had been rendered non-issue and academic. No damages could ever flow from a finding of non-liability against a defendant. In any event, as the defence of *novus actus interveniens* applied, Devan & Associates was completely exonerated from any liability. As regards the appeal by TSR against the counterclaim, since TSR had not disputed the outstanding legal bills which remained unpaid to Devan & Associates, the Court of Appeal affirmed the decision of the trial judge. (paras 38, 39 & 40)

Bahasa Malaysia *Translation Of Headnotes*

Pada tahun 2004, responden ('TSR') telah melantik perayu ('Devan & Associates') untuk mewakilinya dalam satu tindakan guaman yang dibawa terhadapnya oleh Josu Engineering Construction Sdn Bhd di Mahkamah Tinggi Seremban ('Guaman Josu'). Pada masa yang sama, Devan & Associates juga diarahkan untuk mendakwa tuntutan balas terhadap Josu dalam guaman yang sama. Devan & Associates telah menulis kepada TSR untuk mengemukakan dokumen-dokumen mereka bagi membolehkan pemfailan ikatan dokumen TSR dalam Guaman Josu secepat mungkin. Walau bagaimanapun, TSR tidak mengemukakan dokumen-dokumen yang diperlukan dan tidak memberikan sebarang arahan kepada Devan & Associates. Pada pengurusan kes Guaman Josu, Devan & Associates tidak dapat hadir ke mahkamah kerana terlibat dalam kes yang lain di Mahkamah

Tinggi Kuala Lumpur dan juga di Mahkamah Tinggi Shah Alam. Oleh itu, Mohammed Azmi, seorang peguam, telah diarahkan untuk hadir ke Mahkamah Tinggi Seremban dan menyebut bagi pihak Devan & Associates. Semasa pengurusan kes tersebut, Josu menghujahkan bahawa TSR tidak membalas ikatan dokumen-dokumen Josu. Oleh itu, Josu telah membuat permohonan lisan untuk pembelaan dan tuntutan balas TSR dalam Guaman Josu dibatalkan. Hakim Mahkamah Tinggi Seremban ('HMTS') telah membenarkan permohonan lisan Josu semasa pengurusan kes tersebut dan mengarahkan, antara lain, bahawa ganti rugi ditaksirkan oleh Pendaftar ('perintah 6 Februari 2007'). Terkilan, Devan & Associates memfailkan notis rayuan bagi pihak TSR terhadap perintah 6 Februari 2007 tersebut. Kemudiannya, TSR telah melantik peguam baru, Tetuan Jasbeer Nur & Lee ('JNL') untuk mengambil alih pengendalian Guaman Josu daripada Devan & Associates. JNL kemudiannya memfailkan permohonan melalui lampiran 17 untuk mengenepikan perintah 6 Februari 2007 dan telah menarik balik rayuan yang difailkan oleh Devan & Associates. Pada 3 Februari 2009, HMTS menolak lampiran 17, atas sebab bahawa TSR telah menggunakan cara yang salah untuk membatalkan perintah 6 Februari 2007. HMTS berpendapat bahawa cara yang betul dan sesuai adalah dengan memfailkan notis rayuan. TSR telah mengemukakan rayuannya kepada Mahkamah Rayuan ('MR') terhadap keputusan 3 Februari 2009. MR telah menolak rayuan TSR dan permohonan TSR untuk kebenaran bagi merayu kepada Mahkamah Persekutuan juga telah ditolak. Oleh yang demikian, TSR memfailkan tindakan terhadap Devan & Associates di Mahkamah Tinggi Kuala Lumpur ('MTKL') dan mendakwa, antara lain, bahawa Devan & Associates cuai dalam mengendalikan Guaman Josu. TSR juga telah memplidkan amaun yang dituntut dalam Guaman Josu sebagai ganti rugi walaupun dalam Guaman Josu tersebut ganti rugi yang sepatutnya dinilai oleh Pendaftar belum dinilai lagi. Sebagai balasan, Devan & Associates telah memfailkan pembelaannya serta tuntutan balas untuk bayaran bil guaman yang belum dijelaskan bagi perkhidmatan yang diberikan kepada TSR. Selain menafikan kecuaian, Devan & Associates turut membangkitkan, antara lain, isu *novus actus interveniens* kerana terdapat kelompangan yang memudaratkan dalam rantaian penyebaban ganti rugi akibat tindakan JNL. Di akhir perbicaraan, hakim bicara telah membuat penghakiman yang memihak kepada TSR dan membuat deklarasi bahawa TSR berhak kepada ganti rugi sepenuhnya untuk segala kerugian yang diakibatkan oleh perintah 6 Februari 2007 dalam Guaman Josu. Berkenaan tuntutan balas, hakim bicara telah membenarkan jumlah yang dituntut oleh Devan & Associates. Terkilan, Devan & Associates telah mengemukakan rayuan terhadap keputusan Mahkamah Tinggi manakala TSR memfailkan rayuan balas terhadap tuntutan balas Devan & Associates.

Diputuskan (membenarkan rayuan perayu dengan kos; menolak rayuan balas responden dengan kos)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Setelah mempertimbangkan hujahan pihak-pihak mengenai isu *novus actus interveniens*, jikalau TSR telah meneruskan dengan cara yang betul seperti difailkan oleh Devan & Associates, terdapat kemungkinan bahawa perintah 6 Februari 2007 akan diakas berdasarkan merit yang akan mengembalikan pihak-pihak dalam Guaman Josu kepada *status quo*. Perkara penting untuk dipertimbangkan adalah sama ada tindakan penyebab terakhir membentuk sebab tersendiri kerugian secara keseluruhannya dan pelaku salah asal akan terselamat daripada salah laku terawal. Keterangan telah dengan jelas menunjukkan bahawa perbuatan JNL merupakan satu tindakan campur tangan baru yang mempunyai kesan melepaskan Devan & Associates daripada apa-apa liabiliti sepenuhnya terhadap TSR. Dalam undang-undang, *novus actus interveniens* yang dibawa oleh JNL telah memberikan Devan & Associates pembelaan sepenuhnya.

(2) Terdapat merit dalam aduan oleh Devan & Associates bahawa hakim bicara telah gagal untuk mengarahkan fikirannya secara penuh kepada isu *novus actus interveniens* walaupun ia telah dikenal pasti sebagai satu isu untuk dibentangkan semasa perbicaraan. Isu *novus actus interveniens* merupakan isu yang relevan dan sah yang telah dibentangkan dan dikemukakan di hadapan hakim bicara. Hakim bicara apabila tidak menangani fikirannya kepada perkara yang sama telah menafikan Devan & Associates untuk mempunyai satu peluang pembelaan sah yang jelas terbuka kepadanya. Ketidakarahan tersebut terjumlah kepada satu salah arahan.

(3) Devan & Associates mempunyai kewajipan berjaga-jaga terhadap TSR sebagai peguamcara dan peguam yang bertindak bagi pihak TSR dalam Guaman Josu. Dalam hubungan peguamcara dengan anak guam, terdapat keperluan bagi kedua-dua pihak untuk menjalankan peranan masing-masing dengan baik. Adalah jelas bahawa TSR tidak membekalkan dokumen kepada Devan & Associates untuk tujuan penyediaan penyata pembelaan dan tuntutan balas dalam Guaman Josu. Oleh itu, Devan & Associates tidak melanggar kewajipan berjaga-jaga yang terhutang kepada TSR. Hakim bicara telah terkhilaf dalam membuat dapatan bahawa Devan & Associates telah cuai. Oleh itu, Devan & Associates tidak bertanggungjawab untuk apa-apa ganti rugi.

(4) Merujuk kepada ketidakhadiran Devan & Associates secara sendiri di hadapan Mahkamah Tinggi Seremban, Devan & Associates telah mengatur supaya seorang peguam yang lain menyebut bagi pihaknya. Ini adalah justifikasi yang mencukupi dan ia tidak boleh dianggap sebagai satu penghinaan kepada mahkamah. Memandangkan tiada kecuaian dibuktikan terhadap Devan & Associates, isu ganti rugi tidaklah menjadi

satu isu dan adalah akademik. Tiada ganti rugi yang dapat mengalir dari suatu dapatan ketiadaan liabiliti terhadap defendan. Dalam apa jua keadaan, oleh kerana pembelaan *novus actus interveniens* diguna pakai, Devan & Associates telah dilepaskan sepenuhnya daripada sebarang liabiliti. Berkenaan rayuan oleh TSR terhadap tuntutan balas, kerana TSR tidak mempertikaikan bil guaman tertunggak yang masih belum dibayar kepada Devan & Associates, Mahkamah Rayuan mengesahkan keputusan hakim bicara.

Case(s) referred to:

Billion Origin Sdn Bhd v. Newbridge Networks Sdn Bhd & Anor; Yap Burgess Rawson International Sdn Bhd (Third Party) [2006] 4 CLJ 113 HC ***(foll)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(refd)***

Lim Soh Wah & Anor v. Wong Sin Chong & Anor and Another Appeal [2001] 2 CLJ 344 CA ***(refd)***

Muirhead v. Industrial Tank Specialities Ltd [1986] 1 QB 507 ***(refd)***

Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***

For the appellants - Lim Kian Leong (Bastian Vendargon, Gene Vendargon & Paul Ngooi with him); M/s Lim Kian Leong & Co

For the respondents - Maurice Ernest Scully (Lee Kok Phong with him); M/s M Scully

[Editor's note: For the High Court judgment, please see TSR Bina Sdn Bhd lwn. Devan & Associates [2013] 1 LNS 590.]

Reported by Sandra Gabriel

JUDGMENT

Abang Iskandar JCA:

Facts In Brief

[1] In 2004, Devan & Associates, the appellant (defendant in the court below) was engaged by TSR Bina Sdn Bhd, the respondent (plaintiff in the court below) to represent it in defending a suit brought against it by Josu Engineering Construction Sdn Bhd (hereinafter known as "Josu"). The appellant was also instructed, at the same time, to prosecute a counterclaim against the said Josu in the same suit. The said civil suit was filed against the respondent in the Seremban High Court as Civil Suit No MT1-22-2-2004 ("Josu's suit").

[2] By a letter dated 19 September 2006, the appellant wrote to the respondent to forward their documents to enable the filing of the respondent's bundle of documents in the Josu's suit as soon as possible. From 18 September 2006 to 6 February 2007, the respondent did not forward the required documents nor gave any instructions to the appellant. Neither did the respondent make any comments pertaining to the documents forwarded by the plaintiff in the Josu's suit though the appellant had required it to do so for the purpose of the Josu's suit.

[3] At the case management of the Josu's suit on 6 February 2007, the appellant could not attend court as it was engaged in other matters in Kuala Lumpur High Court as well as in Shah Alam High Court. One of these matters had involved an injunction application. As such, one Mohammed Azmi bin Mohd Said, a counsel was instructed to be present at the Seremban High Court, with a view to mention on behalf of the appellant at the said case management in the Josu's suit. During the said case management, Josu's counsel submitted that the respondent's solicitors (ie, the appellant) had not responded to Josu's bundle of documents. In the result, counsel for Josu, one Rajentharan a/l Nadeson then made an oral application before the learned High Court Judge that the TSR's (respondent in this appeal) defence and counterclaim in the Josu's suit ought to be struck out accordingly.

[4] The learned High Court Judge allowed Josu's counsel's oral application during the said case management on the 6 February 2007 and ordered in terms of para. 36(a), (b), (c) and (d) of the statement of claim and that damages be assessed before the Registrar ("6 February 2007 order"). The said order dated the 6 February 2007 was subsequently amended to read paras. 9.1(a) to 9.1(1) (iii) instead of para. 36(a), (b), (c) and (d). The part on assessment of damages to be ventilated before the Registrar was left untouched.

[5] Aggrieved by the said decision, the appellant had on 5 March 2007 filed a notice of appeal on behalf of the respondent against the 6 February 2007 order.

[6] On 22 March 2007, the respondent appointed new solicitors, Messrs Jasbeer, Nur & Lee ("new solicitors") to take over the conduct of the Josu's suit from the appellant. The new solicitors then filed an application to set aside the 6 February 2007 order and withdrew the appeal (which was filed by the appellant before). This application to set aside was dated 4 April 2007 in the High Court at Seremban as encl. 17 in the Josu's suit.

[7] On 3 February 2009, the High Court Judge at Seremban had dismissed the respondent's setting aside application in encl. 17, the reason being that the respondent had employed the wrong mode in its attempt to overturn the 6 February 2007 order issued by the Seremban High Court in the Josu's suit. The learned High Court Judge, in dismissing the application by the new solicitors for the respondent to set aside the judgment entered against it by the Seremban High Court Judge, was of the view that the correct and proper mode ought to have been by way of filing a notice of appeal. The case of *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233; [2001] 3 MLJ 481 was cited by the learned High Court Judge for his decision.

[8] The respondent (TSR) had then appealed to the Court of Appeal against the 3 February 2009 decision. The Court of Appeal dismissed the respondent's appeal on 16 August 2011. The respondent's application for leave to appeal to the Federal Court also failed when it was dismissed on 14 February 2012.

The Present Suit

[9] As to the genesis of this present suit, the respondent had on 4 February 2013, filed a writ and statement of claim in the Kuala Lumpur High Court, against the appellant in the present suit, alleging among others, that the appellant had been negligent in handling the Josu's suit. The respondent had also pleaded the amount claimed in the Josu suit as damages even though in the Josu's suit, the damages were to be assessed and till the date of the decision in the present proceedings on 30 August 2013 no amount of damages had been quantified as yet.

[10] The appellant had filed in its statement of defence as well as a counterclaim. Apart from denying negligence as alleged by the respondent, the appellant had raised the issue of whether there was a fatal break in the chain of causation of damage (*novus actus interveniens*). This was identified as issue 32 of Bundle 1 in the proceedings before the learned trial judge. The other defences had related to the contention that the plaintiff was the author of its own misery, in that it had itself caused the alleged losses or was contributory in the alleged negligence; and that the plaintiff had failed to prove the losses. For good measure, the appellant had filed a counterclaim for unpaid legal bills due to the appellant for services rendered.

[11] At the conclusion of the full trial, the learned trial judge of the High Court in Kuala Lumpur had allowed the plaintiff's/respondent's claim with costs. The learned trial judge had then entered judgment in favour of the plaintiff and made a declaration that the respondent was entitled to a full indemnity for all losses as a result of the adverse 6 February 2007 order in the Josu's suit, and awarded a sum of:

(a) RM6,066,656.59 from the date of filing the writ until full settlement with 4% interest pa for the special damages;

(b) RM220,802.05 from the date of filing until full settlement with 4% interest pa for solicitor cost;

(c) RM3,422,611.95 from the date of filing until full settlement with 4% interest for the striking out of the counterclaim of TSR Bina Sdn Bhd in Seremban High Court Civil Suit No MT1-22-2-2004 to be paid by the defendant to the plaintiff; and

(d) Costs of RM40,000.

[12] As regards the counterclaim, the learned trial judge had noted that the plaintiff had admitted that it had not paid the five bills and therefore she had allowed the sum claimed at RM51,102 with interest at 5% pa from one month from date of bills until full payment and costs also at RM40,000.

A **This Appeal**

[13] Dissatisfied with the decision of the High Court, the appellant had filed a notice of appeal to this court on 3 September 2013, while the respondent filed their cross appeal on 7 October 2013 on the counterclaim.

B **[14]** Before us, learned counsel for the appellant, Mr Lim Kian Leong had raised several issues pertaining to this main appeal, including the issue of whether the appellant ought to have been found liable for the tort of negligence, but finally it all gravitated to the issue of whether the principle of *novus actus interveniens* ought to apply in the circumstances of this case.

C **[15]** In the scheme of things pertaining to this case, we would agree that the issue surrounding the applicability of the defence of *novus actus interveniens* and its treatment by the learned trial judge would need to be addressed first, as its determination would, to a very large extent, impact on the eventual outcome of this appeal before us, in the sense that even if the appellant was D guilty of negligence, it would still not be liable for the alleged losses suffered by the respondent if there was indeed an event that had happened subsequent to the alleged negligence which had the effect of breaking the chain of causation of damage.

[16] At the outset, we agreed with learned counsel for the appellant that the E learned trial judge did not consider at all this legal defence in her grounds of judgment. Nowhere did she address her mind to this relevant and pertinent legal defence that was open to the appellant and which issue was submitted at quite some length before her in the appellant's written submissions at paras. 55-63 where this defence was categorically captioned as 'B. *Novus actus* F *interveniens*.'

[17] This defence of *novus actus interveniens* or break in the chain of causation of damage was articulated, in essence, before the learned trial judge in the High Court as follows. It was the appellant's case that the appellant had correctly filed the notice of appeal against the 6 February 2007 order by G the Seremban High Court, on behalf of the respondent on 5 March 2007. As it had come to pass, the respondent had appointed new solicitors Messrs Jasbeer, Nur & Lee and the new solicitors had since filed an application to set aside the 6 February 2007 order. They had also withdrawn the notice of appeal that was filed previously by the appellant. In the respondent's H affidavit, as found in the record of appeal, vol. 2(6), para. 8 at p. 1142, the reason for the new solicitors' course of action pertaining to the withdrawal of the notice of appeal would become obvious. Therein, it was affirmed as follows:

> … The Applicant's new solicitors, Messrs Jasbeer, Nur & Lee had I subsequently withdrawn the appeal to pursue with the Appellant's setting aside application on the basis that the proper mode ought to have been the latter (setting aside application).

It was also submitted before the learned trial judge that the appellant was never consulted about the change in the legal position that was taken by the new solicitors. This was backed by the evidence adduced in the court below when counsel for the defendant (appellant here) had asked the plaintiff during cross-examination, as follows:

> D's counsel: And you would agree with me that when you made the decision, to withdraw the appeal you did not discuss this with Mr. Devan?
>
> NKK: Yes.

(See, Nota Keterangan in rekod rayuan (Jilid 2(1) - Bahagian B) p. 173 lines 7-10 therein).

[18] It was urged upon us by Mr Lim Kian Leong, learned counsel for the appellant, that what happened in court subsequent to the application to set aside the 6 February 2007 was of great significance and had acute bearing, in so far as the defence of *novus actus interveniens* as put up by the appellant was concerned.

[19] What had transpired on 3 February 2009 has been that the application filed by the new solicitors seeking to set aside the 6 February 2007 order by the Seremban High Court was dismissed by the High Court on account of the fact that the mode that was employed by the new solicitors was the wrong mode. The appeal by the respondent against that decision was dismissed by the Court of Appeal on 16 August 2011. The motion for leave to appeal filed by the respondent to the Federal Court for leave to appeal was also dismissed on 14 February 2012. That had put paid to the attempts made by the respondent to overturn 6 February 2007 order.

[20] As such, it was submitted before us by learned counsel for the appellant that it was at that point in time that an intervening act had occurred that had broken the chain of causation of damage and that intervening act was done by the respondent itself, through their new solicitors in withdrawing the notice of appeal that was filed by the appellant against the 6 February 2007 order. It was argued that the wrong mode employed by the new solicitors had denied the respondent the opportunity to even begin to ventilate its grievance against the adverse 6 February 2007 order when the application to set aside was unceremoniously dismissed by the court at all levels including the Federal Court. The fact of the matter was that despite the clear legal position on what the correct mode ought to have been employed, the new solicitors had nevertheless pursued the wrong mode in prosecuting the respondent's matter pertaining to 6 February 2007 order.

[21] This position of the law pertaining to the correct mode to employ in challenging an order such as 6 February 2007 order was recently re-affirmed by the Federal Court in *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 MLJ 461 where the apex court had held, among others:

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> The plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the plaintiff accepted the correctness of the decision to dismiss its suit. Further, the failure to appeal has itself been recognised as an abuse of process because the second suit would be construed as an attempt to circumvent the appeal procedure [per Justice Zulkefli Ahmad Makinuddin CJ (Malaya)].

B

[22] Of course, we had also considered the respondent's submission on this point as contained in paras. 3.29 and 3.30 of its written submissions dated 14 November 2013. We noted that there was nothing much advanced by the respondent in terms of responding to the issue of *novus actus interveniens* save by reproducing an excerpt from the judgment in the decision in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 from which it was submitted that the respondent "had lost an opportunity to convince the judge by way of oral testimony and documentary evidence that they had a complete answer to the claim had they been brought against them."

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D

[23] Having considered the submissions of parties on this issue of *novus actus interveniens*, we would with respect, agree with learned counsel for the appellant that had the respondent continued with the correct mode as filed by the appellant, there was the likelihood that 6 February 2007 order might have been overturned on its merit which would then have the effect of returning the parties in the Josu's suit to *status quo*.

E

[24] The principle of *novus actus interveniens*, which is a Latin term, it means a new intervening act. It is an act or event that breaks the causal connection between a wrong committed by the defendant and subsequent happenings. The new event relieves the defendant from responsibility for the happenings. As to the effect of this defence of *novus actus interveniens*, we would only allude to the decision of Justice James Foong J (as he then was) in the case of *Billion Origin Sdn Bhd v. Newbridge Networks Sdn Bhd & Anor; Yap Burgess Rawson International Sdn Bhd (Third Party)* [2006] 4 CLJ 113 at para. (30) therein, where he had said:

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> ... This concept of *novus actus interveniens* acts in this manner: If a particular consequence of the defendant's wrongdoing is attributable to some independent act or event which supersedes the effect of the initial tortious conduct, then the defendant's responsibilities may not extend to the consequences of the supervening event. In short, if there is a break in the chain of causation then the original wrongdoer is not liable for starting the wrong – see *Clerk & Lindsell on Torts*, 17th edition, para 2-24.

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[25] In fact, the working of this concept can be seen, as a further illustration, in the case of *Muirhead v. Industrial Tank Specialities Ltd* [1986] 1 QB 507 where it was said by the English Court of Appeal at p. 533, as follows:

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> In such a case there would be two contributory causes of the damage-the failure of the pumps, due to the negligence of the manufacturer, and the failure to attend at the fish farm, due to the negligence of the supervisor.

> I cannot see that the former could escape liability on the simple basis that he did not anticipate the negligence of the latter, especially when the purpose for which his goods were to be used was, as he should have appreciated, to preserve the health and lives of the fish. Only where the act or omission of another was of such a nature that it constituted a wholly independent cause of damage, i.e. a *novus actus interveniens*, could the manufacturer escape all liability for the damage ...

[26] From the above, it is clear that the crucial point to consider is whether the last causative act constituted a wholly independent cause of damage. In the words of the Lord Justices in the *Muirhead*'s case, it is in a situation "where the act or omission of another was of such a nature that it constituted a wholly independent cause of damage, ie, a *novus actus interveniens*," such that the original tort-feasor would escape liability for his initial wrong doing.

[27] In this appeal before us, it was submitted on behalf of the appellant that the action of the respondent through its new solicitors, in filing an application to set aside 6 February 2007 order and withdrawing the appeal was a *novus actus interveniens* which fatally broke the chain of causation.

[28] Applying the principle that was explained clearly by learned Justice James Foong in the *Billion Origin Sdn Bhd* case *(supra)* in citing the authoritative works of the learned authors of *Clerk & Lindsell on Torts*, 17th edn, as "there is a break in the chain of causation then the original wrongdoer is not liable for starting the wrong." To our minds, the evidence had clearly shown that the subsequent act of the new lawyers for the respondent had effectively constituted a new intervening act which had the effect of completely exonerating the appellant of any liability towards the respondent. In that regard, we had agreed with the appellant.

[29] As such, there is merit in the complaint by the appellant that the learned trial judge had failed to completely address her mind to this issue of *novus actus interveniens* although it was identified as an issue to be ventilated during the trial. To our minds, that issue was a relevant and valid issue that had been ventilated and submitted before the learned trial judge and in not addressing her mind to the same the appellant had been denied the opportunity of having a legal defence that was clearly open to it being judicially considered by the learned trial judge. That non-direction had amounted to a misdirection.

[30] It must be reiterated that the evidence had clearly shown that indeed there was an intervening act by the new lawyers for the respondent. Suffice for us to say here that the lost opportunity that was complained of by the respondent was caused by the intervening act of the new solicitors of the respondent who had withdrawn the notice of appeal properly filed by the appellant in favour of an application to set aside 6 February 2007 order, which course of action were subsequently dismissed on account of the fact that it was an erroneous mode of challenging 6 February 2007 order. In law, that *novus actus interveniens* brought about by the new solicitors had accorded

A the appellant a complete defence. On that ground alone, we were of the view that this appeal ought to be allowed, as the action by the respondent, against the appellant was, in the circumstances untenable.

[31] Be that as it may, we had nevertheless also perused through the materials placed before us in this appeal and proceeded to consider the issue
B of negligence which appeared to have completely engulfed the mind of the learned trial judge to the extent that she had completely omitted from directing her mind to the defence of *novus actus interveniens*.

[32] We noted however, that the learned trial judge had correctly directed her mind as to the required legal ingredients that a plaintiff must prove in
C order to succeed in a claim for negligence against a defendant, namely that the defendant must owe a duty of care to the plaintiff; that the defendant has breached that duty of care; and as result of which the plaintiff has therefore suffered damages. In this case, it is beyond dispute that the appellant owed a duty of care to the respondent as solicitors and counsel acting for the
D respondent in the Josu's suit. In such a relationship of solicitor and client, there is a need for both parties to be able to discharge their respective roles properly. In this case, the circumstances had been such that the Josu's suit had not gone for trial yet. As far as the court was concerned, the parties were still at case management stage. Much work had yet to be done before the case
E could be ready for trial. In terms of the appellant and respondent, documents had to be prepared in order that the appellant could prepare the statement of defence and the counterclaim in respect of the Josu's suit in which the respondent was the defendant. From the perusal of the appeal records, it is clear to our minds that the respondent had not been forthcoming with the
F supplying of documents to the appellant for the purpose of preparing the statement of defence and the counterclaim in the Josu's suit.

[33] In her judgment, the learned trial judge had faulted the appellant in that it had breached its duty of care by failing to furnish information to the respondent regarding the progress of the Josu's suit in the Seremban High
G Court. The crux of the learned trial judge's discontent could be seen in p. 35 of her grounds of decision. The learned trial judge had, among others, said:

> Ketidakhadiran Defendan pada hari pengurusan kes, kes Mahkamah Tinggi Seremban pada 06.02.2007 merupakan satu penghinaan kepada Mahkamah. Di dalam kes *Syarikat Siaw Teck Hwa Realty & Developments*
H *Sdn Bhd v. Malek Joseph Au* [1999] 3 CLJ 184, menyatakan:
>
> > A solicitor has a very high duty imposed upon him to his client. The Defendant's failure to attend Court as the day schedule for the hearing of the appeal in this case was a blatant non-compliance with the relevant provision of the legal profession (Practice and
> I Etiquette) Rules 1978, not to mention a total disrespect to the Federal Court.

> Keterangan menunjukkan bahawa Defendan telah gagal untuk hadir ke Mahkamah secara peribadi pada 06.02.2007 dan gagal memberi perhatian profesional pada kes Plaintif. Semua ini membuktikan perlaksanaan yang tidak profesional dan kecuaian Defendan.

[34] Premised on those findings, the learned trial judge had found the appellant liable for negligence and had awarded judgment in the sum as indicated in the early portion of this judgment of ours.

[35] Before us, the appellant had submitted that the findings of the learned trial judge could not be supported by the evidence as led before her. On the other hand, on behalf of the respondent, we were urged to uphold the learned trial judge's decision.

[36] Having perused through the appeal record, with respect we agree with learned counsel for the appellant that contrary to what had been found by the learned trial judge in the stated paragraphs above, there was evidence to show that the appellant did in fact inform the respondent of the progress of the Josu's suit to the respondent. Not only was the respondent being kept informed of the progress of the suit, the appellant had also requested the respondent to file in their bundle of documents before the 2 January 2007 which was the final case management of the Josu's suit. This request was made on 19 September 2006 which was more than four months from 6 February 2007. The respondent was advised that failure to comply might jeopardise their case. Subsequent to that date, namely on 25 September 2006 the appellant had written a letter to the respondent requesting specific documents relating to the Josu's suit to prepare the statement of defence and supporting documents to substantiate the counterclaim. It was also requested of the respondent to provide their comments to the three volumes of documents that were forwarded by Josu's solicitors.

[37] Based on this kind of evidence, we agreed with learned counsel for the appellant that the appellant had not breached the duty of care that was owed to the respondent. That being the case, the learned trial judge had, with respect, erred when she had found the appellant to be negligent and further, there was no incidence of contributory negligence having been occasioned by the appellant. As such, the appellant was therefore not liable for any damages.

[38] In reference to p. 35 of the learned trial judge's comment on the non-appearance of the appellant personally before the Seremban High Court, suffice for us to say that the undisputed fact that the appellant had arranged for another counsel to mention on his behalf would, in the circumstances be sufficient justification and that it could not therefore be considered as an insult to the court. Indeed that counsel had appeared before the learned High Court Judge in Seremban as requested by the appellant. Had the appellant

not sent anyone to appear on his behalf on the 6 February 2007, perhaps such omission may justify such adverse comment from the learned trial judge in the present suit.

[39] As there was no negligence established against the appellant, the issue of damages had been rendered, for the purpose of this appeal, a non-issue and academic. No damages could ever flow from a finding of non-liability against a defendant.

[40] In any event, as the defence of *novus actus interveniens* applied in this case, the appellant was therefore completely exonerated from any liability.

[41] As regards the appeal by the respondent against the counterclaim, we noted that it had emanated from unpaid legal bills which altogether had totalled RM51,102. We had looked at the justification given by the learned trial judge in entering judgment in favour of the appellant, which basically had been that the respondent had not disputed this outstanding legal bills remaining unpaid to the appellant. Under the circumstances, we had decided to affirm her decision on the appellant's counterclaim against the respondent for legal services so rendered.

[42] Under the circumstances, we were of the considered view that this had been a fit and proper case where we ought to invoke our appellate power to right what was an appealable error that was committed by the learned trial judge. Her non-appreciation of the defence of *novus actus interveniens* had amounted to a misdirection by way of judicial non-direction of evidence that was validly led before her. While the law reports are replete with high authority for saying that decisions so concluded may be set aside, we need only to refer to the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19.

[43] In the upshot, therefore we had allowed the appeal with costs. The judgment of the High Court dated 30 August 2013 is set aside in part, ie, in respect of items (a) until (h) of the plaintiff's claim. The judgment in respect of items (i) until (iii) under the defendant's counterclaim, is however affirmed. We also dismissed the cross-appeal by the respondent with costs. As to costs, we ordered costs of RM70,000 here and below for both the main appeal as well as the cross-appeal to be paid by the respondent to the appellant. We also ordered the deposit to be refunded to the appellant. We had so ordered.